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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. A-1254

MIKE ANDERSON, ET AL.,
Petitioners,

VERSUS

PRESTON TRIMBLE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

STEPHEN JONES
525 Fidelity Plaza
Oklahoma City, Oklahoma 73102
(405) 239-6707

Attorney for Petitioners

July, 1974

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Citation to Opinion Below	2
Jurisdiction	2
Questions Presented	3
Constitutional and Statutory Provisions	3
Statement of the Case	4
Reasons for Granting the Writ	7
I. This case raises significant questions as to the awarding of declaratory and injunctive relief in light of Younger v. Harris, and Dombrowski v. Pfister	7
II. The decision below poses a significant question as to the rights of a potential defendant to receive injunctive and declaratory relief in State Court to protect him and secure his constitutional rights	9
III. This case raises a significant issue as to the right to receive injunctive and declaratory relief against the enforcement of a statute which is patently and flagrantly unconstitutional	11
Conclusion	12

APPENDICES

Appendix I—Order Granting the Extension of Time	i
Appendix II—Title 21 O.S. §§1218, 1219	ii

TABLE OF CONTENTS CONTINUED PAGE

Appendix III—Opinion of the District Court of Cleveland County, Oklahoma ..... iii-x

Appendix IV—Opinion of the Supreme Court of Oklahoma ..... x-xix

Appendix V—Order of the Supreme Court of Oklahoma Denying Petition for Rehearing xix

TABLE OF AUTHORITIES

CASES:

Dombrowski v. Pfister, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 9

Young, Ex parte, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 9-10

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) 8, 10

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment I 3, 4-5, 8

United States Constitution, Amendment XIV, Section 1 ..... 3, 5

United States Constitution, Article VI, Clause 2 ..... 4, 10

STATUTES:

21 O.S. §§1218, 1219 ..... 3, 4, 5, 8

28 U.S.C. §1257 2

In the
Supreme Court of the United States
OCTOBER TERM, 1974

No. A-1254

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

The Petitioners, Mike Anderson, Donald F. Parker, William Earls, and Nelson Barry on behalf of themselves and as representatives of a class of all other persons who will participate in an anti-war demonstration to be held in Cleveland County, Oklahoma, on Labor Day, 1971, and on behalf of the War Resister's League of Oklahoma, and the Viet Nam Veterans Against the War, of Oklahoma, both unincorporated associations, pray that a Writ of Certiorari issue to review the judgment herein presented, of the Supreme Court for the State of Oklahoma, filed of record the 8th day of January, 1974, which became a final judgment of that Court.[1]

[1] The Respondents to this action are Preston Trimble, as District Attorney of Cleveland County, State of Oklahoma. Also named as Respond-

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Oklahoma is recorded as *Anderson* v. *Trimble*, at 519 P.2d 1352.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma, in the above-styled case, became final in Case No. 45,198, decided on January 8, 1974. A Petition for Rehearing was timely filed and was denied on March 26, 1974. The case is cited at 519 P.2d 1352, a copy of which is found in Appendix IV. An Application for Extension of Time to File Petition for Writ of Certiorari was filed with this Court, requesting that the time in which to file this Petition be extended from June 25, 1974, to and including July 25, 1974. A copy of the Order granting the extension of time is attached in Appendix I.

This Petition is filed pursuant to that Order. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

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[1] (Continued)

ents herein are Mr. and Mrs. Vestor L. Baker, Mr. and Mrs. James H. Bernard, Mr. and Mrs. Lee C. Burton, Mr. and Mrs. Richard Campbell, Mr. and Mrs. W. B. Eoff, Mr. and Mrs. Cecil L. Hayes, Mr. and Mrs. Don High, Mr. and Mrs. Elston C. Johnson, Mr. and Mrs. Richard Latimer, Mr. and Mrs. Norman F. Loeffler, Mr. and Mrs. Floyd L. McElreath, Mr. and Mrs. Perda Miller, Mr. and Mrs. Chester L. Moffitt, Mr. and Mrs. R. M. Mullins, Mr. and Mrs. Bill Parsons, Mr. and Mrs. Lawrence R. Riley, Mr. and Mrs. William T. Robbins, Jr., Mr. and Mrs. W. R. Rycoft, Mr. and Mrs. Frederick Sanders, Mr. and Mrs. William E. Saunders, Mr. and Mrs. Chester O. Shackelford, Mr. and Mrs. Floyd L. Thompson, Dr. and Mrs. L. A. Rentschler, Mrs. Mary Reyman, Mrs Bonnie Bolding, Parents To Uphold Servicemen's Honor, Inc., a corporation. These persons with the exception of Preston Trimble were listed below as Appellants Intervenors.

QUESTIONS PRESENTED

1. Whether a statute which makes it a crime for the Petitioners to display the names of war dead in "anti-war, anti-police action or anti-draft demonstration" is patently and flagrantly unconstitutional on its face and in direct violation of the First Amendment of the Constitution?

2. Are the Petitioners entitled to declaratory and injunctive relief against a statute which is patently and flagrantly unconstitutional, where they are threatened with irreparable harm by the enforcement of the statute?

3. Are Petitioners who are entitled under the Constitution of the United States to declaratory and injunctive relief in United States District Court, also entitled to the relief in State Court?

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment XIV, Section I:

> ". . . [n]or shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Title 21 O.S. §§1218, 1219, are printed in accompanying Appendix II.

United States Constitution, Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . and the judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

STATEMENT OF THE CASE

The Petitioners in this action have been and are active in protesting and demonstrating against the policy pursued by the Government of the United States in Southeast Asia. As part of their protest they have joined together in membership in various organizations, two of which are the Viet Nam Veterans Against the War, and the War Resister's League of Oklahoma.

Respondent, Preston Trimble, is the District Attorney of Cleveland County, State of Oklahoma, and was sued in his official capacity. The other named Respondents, Mr. and Mrs. Vestor L. Baker, and others entered as intervenors in the lower court action on behalf of the defendants therein and are herein referred to as Respondents.

They are the parents or spouses of servicemen who died while a member of the Armed Services.

The Petitioners filed a Petition in the District Court of Cleveland County, State of Oklahoma, seeking a temporary and permanent injunction against the enforcement of 21 O.S. §§1218, 1219, and further they sought declaratory relief declaring the statute unconstitutional under the First

Amendment and Fourteenth Amendment of the United States Constitution.

The statute in question reads in part:

> "It shall be unlawful for the names of persons killed in military action to be carried displayed on cards or placards or otherwise published for the purpose of any anti-war, anti-police action or anti-draft demonstration or protest on the grounds of schools, colleges, universities, . . . without the written consent of the surviving spouse of such deceased person, if married at the time of death, or, if unmarried, the written consent of one or both parents, or if they both be deceased, then the next of kin." 21 O.S. §1218.

21 O.S. §1219 provides that the commission of the action is a misdemeanor and upon conviction the person shall be imprisoned in the county jail not less than thirty (30) days nor more than one (1) year, or shall be fined in an amount of not more than Five Hundred and No/100ths Dollars ($500.00), or both, by fine and imprisonment.

The Petitioners in seeking their declaratory and injunctive relief stated in their Amended Petition, that they intended to display on cards and placards and to otherwise cause to be published for the purpose of protesting against the war and against the draft, the names of persons who had been members of the United States Military and had died as a result of United States involvement in Viet Nam. The Petition also stated that it was their intention to take these actions on the grounds of the University of Oklahoma in Norman, Oklahoma. The Petitioners also stated that they did not intend to receive written consent from

anyone concerning the use of these names. Further, the Petitioners stated that should they not receive the relief which they requested by Labor Day, 1971, they would continue their protest and that they intended to continue to display and to otherwise publish the names of the war dead in the manner that is stated above.

The Petitioners alleged and the answer of the Respondent, Preston Trimble, affirmed that he would as District Attorney enforce this statute unless such be declared unconstitutional and he be enjoined therefrom. The Petitioners also alleged that such prosecution would cause them severe and irreparable harm. It was argued both in court and in the briefs of the parties that the statutes are patently and flagrantly unconstitutional on their face and in their application. It was also argued that the existence of the statute had a chilling effect upon the constitutional rights of the defendants and upon the rights of others.

On September 8, 1971, the District Court of Cleveland County, State of Oklahoma, issued a Memorandum Opinion which is attached in Appendix III. The court also issued an injunction restraining the District Attorney from enforcing what it found to be a law in violation of the First and Fourteenth Amendments of the Constitution of the United States.

The Respondents to this action then perfected an peal to the Supreme Court of the State of Oklahoma, wherein the Respondents argued that it was error for the trial court to decide that the statute was unconstitutional and to enjoin its enforcement. The Petitioners argued, as they did in the trial court, that the enforcement of the stat-

utes and the failure to grant an injunction against this enforcement would do them irreparable harm and be in violation of the Constitution of the United States. The Supreme Court of Oklahoma adopted *sua sponte* the theory that the Court was without authority to grant injunctive and declaratory relief in a case involving criminal prosecution. The Court thereby reversed the Order and the Judgment of the trial court as to the injunctive and declaratory relief awarded the Petitioners therein. A copy of the Opinion is attached as Appendix IV.

The decision of the Supreme Court of Oklahoma adversely affected the constitutional rights of the Petitioners and this Petition for Writ of Certiorari follows that adverse decision.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE RAISES SIGNIFICANT QUESTIONS AS TO THE AWARDING OF DECLARATORY AND INJUNCTIVE RELIEF IN LIGHT OF *YOUNGER* v. *HARRIS*, AND *DOMBROWSKI* v. *PFISTER*.

The facts of this case clearly present a situation where the Petitioners were and still are under an actual threat of prosecution by the State should they undertake the actions which they have planned. The statute under which the Petitioners are threatened with prosecution states that it shall be unlawful to publish the names of the war dead where they are "published for the purpose of any anti-war, anti-police action or anti-draft demonstration or protest." 21 O.S. §1218. In addition to the severe and irreparable harm

that prosecution under this statute would cause the Petitioners, the statute also has a continuing and chilling effect upon their First Amendment rights and their Fourteenth Amendment rights.

In this case, it is important to recognize the facts which are not presented to the Court. First of all, this is not a case in which a Federal Court was asked to enjoin a State criminal prosecution, as was the case in *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). This case is not one where there is an issue of "comity" between the State and the Federal Courts. There has been no attempt to involve any Federal Court in this matter until after the highest Court of the State of Oklahoma had been given an opportunity to address the issue of the constitutionality of the statute involved. It was only after the Petitioners had exhausted their State remedies that they came before this Court in order to protect their First Amendment rights.

Nor is this a case where there is a criminal case which has been commenced, thereby affording a forum in which all defenses including the constitutionality of the statute can be presented. It is logical that where a prosecution is taking place in a court of law, a court of equity would not interfere. But in this case the Petitioners have attempted to avoid the process of breaking the law, being arrested, and then presenting the unconstitutionality of the statute. As a defense, the Petitioners have instead chosen to go first to the Court and present their constitutional claims there rather than taking the law into their own hands by first breaking the law.

It is also to be noted that this is not a case where the prosecution is speculative, the intention to prosecute was clearly announced by the District Attorney in his answer to the Petition in the trial court.

This case does in fact pose that narrow, but essential fact situation where a person is entitled under the Constitution to declaratory and injunctive relief. See *Ex parte, Young*, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441, and *Dombrowski* v. *Pfister*, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116. This case avoids the substantial objections to granting such relief that are found in *Younger* v. *Harris, supra*, and presents instead a statute which is patently and flagrantly unconstitutional; a procedure whereby the Petitioners attempted to avoid conflict between the State and Federal Courts; and a situation where the prosecution is real and not imagined.

II.

THE DECISION BELOW POSES A SIGNIFICANT QUESTION AS TO THE RIGHTS OF A POTENTIAL DEFENDANT TO RECEIVE INJUNCTIVE AND DECLARATORY RELIEF IN STATE COURT TO PROTECT HIM AND SECURE HIS CONSTITUTIONAL RIGHTS.

It is clear that if a person has a right under the Constitution of the United States to receive declaratory and injunctive relief under a particular and narrow set of circumstances, that this right to receive relief extends to State Court as well.

The right is stated in *Dombrowski* v. *Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22, and *Ex parte, Young*, 209

U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714; see also *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669. It is clear under those decisions cited above that the granting of declaratory and injunctive relief in certain circumstances involving a patently and flagrantly unconstitutional statute is a constitutional right.

It is equally clear that under the Supremacy Clause of the Constitution that State Courts have a duty to enforce and protect the constitutional rights of the citizens. Under the Supremacy Clause of the United States Constitution, Article VI, Clause 2, if a person is entitled to receive relief in the United States District Court to protect his rights against State action, it follows that he is entitled to receive the same relief in the State Court.

The importance of enunciating such a doctrine is easy to see where in a federal system such as this, there is a great reluctance on the part of the Federal Courts to enjoin State criminal prosecution. If it were clearly established that under a limited set of circumstances a defendant was entitled to declaratory and injunctive relief in State Court, it would allow him to litigate his issues there, avoid the irreparable harm which the criminal prosecution would do, and most importantly he would avoid asking the Federal Courts to interfere in a matter which hopefully could be properly litigated in the State Courts.

III.

THIS CASE RAISES A SIGNIFICANT ISSUE AS TO THE RIGHT TO RECEIVE INJUNCTIVE AND DECLARATORY RELIEF AGAINST THE ENFORCEMENT OF A STATUTE WHICH IS PATENTLY AND FLAGRANTLY UNCONSTITUTIONAL.

In a nation which is governed by laws rather than the will and actions of individual men, it is essential that a forum be provided where a person can litigate his claims that his constitutional rights are being infringed upon. In order to gain this forum, a nation of laws should not require that the individual take the law into his own hands and break it. But rather the individual should be afforded an opportunity to come before a court of equity and show that 1) he intends to take certain actions which are clearly and specifically forbidden by statute; 2) that the statute involved is patently unconstitutional and cannot be corrected through judicial interpretation; 3) that he will be prosecuted for the actions which he intends to commence; and finally 4) that such prosecution will cause him severe and irreparable harm.

The importance of providing such a forum in a nation of laws is that without it the person who wishes to take what are constitutionally protected actions but which are forbidden by statute must choose to break the law in order to protect the Constitution. A nation which requires its citizens to undertake such a choice will find the rule of law degenerating. Each man will become a court and a legislature unto himself. Such a system is not compatible with the Constitution of the United States and the theoretical foundations upon which it is built.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

STEPHEN JONES
525 Fidelity Plaza
Oklahoma City, Oklahoma 73102
(405) 239-6707

Attorney for Petitioners

July, 1974

APPENDIX I

Supreme Court of the United States

No. A-1254

MIKE ANDERSON, et al.,
Petitioners,
v.
PRESTON TRIMBLE, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 25, 1974.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 2nd day of July, 1974.

APPENDIX II

21 O.S. §§1218, 1219

§1218. Display of Names of Military Dead at Demonstrations or Protests Without Consent Prohibited.

It shall be unlawful for the names of persons killed in military action to be carried, displayed on cards or placards, or otherwise published for the purpose of any antiwar, anti-police action or antidraft demonstration or protest on the grounds of schools, colleges, universities, state institutions, or facilities, county or city institutions or facilities, which are wholly or in part supported by public funds, or on any other public property such as parks and streets dedicated to public use, without the written consent of the surviving spouse of such deceased person, if married at time of death or, if unmarried, the written consent of one or both parents, or if they are both deceased, then the next of kin.

§1219. Penalties.

Any person violating the provisions of this act shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail for not less than thirty (30) days nor more than one (1) years or shall be fined an amount not to exceed Five Hundred and No/100ths Dollars ($500.00) or by both such imprisonment and fine; provided if a person be convicted of such offense a second time, it shall be mandatory that his punishment be jail imprisonment for one (1) year.

APPENDIX III

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA) S.S.
CLEVELAND COUNTY)
FILED In The
Office Of The Court Clerk
SEP 8 1971

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Mike Anderson, et al., Plaintiffs,)
)
vs) No. C-71-407.
)
Preston Trimble, District)
Attorney, Defendant.)

MEMORANDA OPINION

The 1970 Legislature passed 21 O.S.A. 1218, which provides in substance as follows:

> "It shall be unlawful for the names of persons killed in military action to be carried, displayed on cards or placards, or otherwise published for the purpose of any anti-war, anti-police action or anti-draft demonstration or protest on the grounds of any schools, colleges, universities, state institutions or facilities, county or city institutions or facilities . . . without the written consent of the surviving spouse of such deceased person, if married at the time of death, or, if unmarried, the written consent of one or both parents, if they both be deceased then the next of kin."

[APPENDIX]

This action was brought by Mike Anderson, et al., for an injunction to enjoin the District Attorney and the Attorney General, individually and their official capacity from enforcing this section of the law which they allege to be unconstitutional. The Attorney General objected to the *jurisdiction of the* Court which objection was sustained. However, so far as the question of declaring of the constitutionality of the Statute is concerned, notice to him is deemed sufficient, even though the Attorney General is officially released upon his objection, such release applying to both his individual and official capacities. The objection of Preston Trimble to jurisdiction over him as an individual was also sustained at the conclusion of the hearing, and the action continued against him merely in his official capacity.

The allegations of plaintiffs' Petition and their evidence showed that they plan to hold peaceful demonstrations at which the names of deceased veterans killed in war action will be read and displayed. They further alleged and the Answer of defendant affirms that the District Attorney will enforce this Statute unless such be declared unconstitutional and he be enjoined therefrom.

There being no objection, Intervenors were permitted to interplead and offer evidence in this action, which evidence showed Intervenors to be parents of "war dead" who would be aggrieved by the use of their children's names in such a manner as is planned by plaintiffs and that they would suffer emotional damage therefrom.

At the conclusion of the hearing on the Temporary Injunction, the plaintiffs presented argument and a trial brief in which they contend that the Statute is unconstitutional as violating the First Amendment to the Constitution of the United States as a restriction on the freedom of speech. The matter was then taken under advisement to this date to give Intervenors and defendant opportunity to present refuting briefs.

The issues confronted in this case put this trial judge in an extremely difficult position for he is a veteran, member of the American Legion and 40 & 8. He is further "a dyed in wool" member of governmental service, having served since 1950, a member of the Bar Association of the State of Oklahoma and the American Bar Association, active in the section of Judicial Administration and many other areas which infer a commitment to the policies of the "establishment." A great president of the United States once commented on such a dilemma by stating that one who couldn't stand the heat ought to get out of the kitchen. Since I plan to remain in the kitchen, I shall don the nonpartisan robe and render a judgment in this case.

A judge would need be completely desensitized of all human feelings not to feel the turmoil and anguish created in parents of war dead when confronted with the likelihood that the names of their deceased children will be used in a context which they feel is inconsistent with the life and death of those children. It appears cruel, heartless, vicious and vindictive on the part of those professing noble anti-war beliefs to drag forth the name of these war dead for use in the publicizing of conflicting beliefs. It would seem more considerate, humane, tasteful and compassionate if they left the dead to the peace and rest they so well earned and deserve, rather than resurrecting them to further conflict. Yes, if it was left up to a judge as an individual, he would forbid such tasteless, cruel, inhuman and repulsive activity on the part of these findings petitioners.

But I know of no greater tyranny than for a judge, a prosecutor, a policeman or any other individual or official than to impose his own personal belief above and beyond that which is provided by law. If anarchy is ever to prevail in this country, all that's needed to assure its success is for all such officials to start enforcing what they think the law ought to be, and in disregard of the constitutional provisions and guarantees that provide for equal protection of

law. Consequently, this judge feels it necessary to decide this question on a cold, impersonal, rational basis, purely of what is constitutional or unconstitutional, leaving out emotional, political or other controversial views.

The First Amendment of the Constitution of the United States provides that:

> "Congress shall make no law . . . abridging the freedom of speech . . . or the right of people peaceably to assemble."

Decisions are legion that the Fourteenth Amendment has made all of the constitutional guarantees binding not only upon the Congress but all of the States and other subdivisions of government. It is unfortunate that there are those in Oklahoma who resist the decisions of the Supreme Court of the United States, refusing to take cognizance of the first section of the First Article of the Constitution of the State of Oklahoma which provides that:

> "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the Supreme Law of the land."

The question involved in this case simply boils down to this:

> "Is a Statute constitutional which forbids the use of the names of war dead without the prior consent of survivors in connection with any anti-war, anti-police or anti-draft demonstration held in a public place?"

It was suggested that Intervenors represent a class of people who have certain rights in the use of the names of their deceased children and that consequently, plaintiffs should be enjoined from the use of the names of such war dead without the prior written consent of their survivors. This position is not defensible because the parents can have no more rights in the name of their deceased children than the war dead would have themselves.

Recent decisions of the Supreme Court of the United States affect this consideration. New York Times v. Sullivan (1964) 376 U.S. 254, 11 L.Ed 2d 686, 84 S.Ct. 710, held that the First and Fourteenth Amendments to the Constitution "prohibits a public official from recovering damages for defamatory falsehood relating to his official conduct unless he proves the statement was made with actual malice--that is, with knowledge that it was false or with reckless disregard whether it was false or not."

In Garrison v. Louisiana (1964) 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125, the Supreme Court held that trial judges were public officials and the Times v. Sullivan rule should apply. In Curtis Publishing Company v. Butts (1967), 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094. the Supreme Court declared that a national sports figure was a national public figure and that the public official rule should apply. In Green Belt Cooperative Publishing Co. v. Bresler (1970) 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6, the Court ruled that a "local" public figure was in the same category as a national public figure. and that the "public official" rule should apply.

In this case, the names of these war dead have been shown in evidence to have been published, not only in the Congressional Record of the Congress of the United States, but also in the "Role of Honor" in newspapers of statewide circulation. Whether these war dead desired to become public figures or not, such has been thrust upon them, and under the rule of Times Inc. v. Hill (1967), 385 U.S. 374, 87 S.Ct. 534, a right to invade their privacy has been thrust upon them, due to circumstances beyond their control and perhaps even over their resistance.

When one cannot recover damages for his own injury suffered by even defamatory falsehood, it is useless to urge that his estate, heirs or survivors are in any different position than the individual himself. Disagreeable as this conclusion may be, it is indisputable that the law of the land

at this time is that these names became public property upon their publication, and that no right exists on behalf of any person to protect their privacy, or to prevent their use.

The question then narrows itself to one of whether or not the Legislature can, in its wisdom, pass a law which prevents the use of certain names in connection with certain political purposes, here, to prevent the use of the names of war dead in connection with anti-war or "peace" demonstrations.

There is no evidence in this case showing that the proposed peaceful use of the names of war dead will create any clear or present danger, or that any riots or public disorder will result as a consequence. But even if such conduct were to create a breach of the peace, the Supreme Court of the United States has said that "important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." Buchanon v. Warley, 245 U.S. 60, 81, 38 S.Ct. 16, 20, 62 L.Ed. 149.

Intervenors testified that the use of the names of their war dead will cause them anguish, and that it constitutes an invasion of their privacy, resulting in great personal discomfort. Where the Supreme Court noted in New York Times v. Sullivan, supra, that:

> "We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials . . . the constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered."

A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restricted view. For the alternative would lead to standardization of ideas, either by Legislatures, Courts, or dominant political or community groups. Terminiello v. City of Chicago (1949), 337 U.S. 934, 69 S.Ct. 1490, 93 L.Ed. 1131.

The Statute involved in this case only makes it a public offense to use the names of the war dead without survivors consent if for anti-war, anti-draft, or anti-police demonstrations or protests on public property, inferring that pro-war, pro-police action or pro-draft demonstrations or protests on public property may use the names without the requirement of consent from survivors. This is clearly an arbitrary, capricious and unconstitutional use of criminal process to enforce politicial beliefs.

It is the conclusion of this Court that the constitutionality of a Statute has been attached. It is the finding of the Court that the Attorney General has been given notice thereof. It is the conclusion of this Court that the Statute is unconstitutional. It is the further finding of the Court that the District Attorney intends to enforce the Statute by prosecuting alleged violators.

Therefore, the Court concludes as a matter of law that the Temporary Injunction requested herein should be

granted, exceptions allowed the State of Oklahoma and the Intervenors herein.

Dated this 8th day of September, 1971.

Judge.

APPENDIX IV

FOR OFFICIAL PUBLICATION

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA
JAN - 8 1974
Ross N. Lillard Jr.
CLERK

Mike Adnerson, Donald F. Parker, William Earls, and Nelson Berry, on behalf of themselves and as representatives of a class of all other persons who will participate in an anti-war demonstration to be held in Cleveland County, Oklahoma, on Labor Day, 1971, and on behalf of the War Resister's League of Oklahoma and the Viet-Nam Veterans Against the War, of Oklahoma, both unincorporated associations,

Appellees,

vs.

No. 45,198

Preston Trimble, individually and as District Attorney of Cleveland County, State of Oklahoma,

Appellant,

M/M Vestor L. Baker; M/M James H. Bernard; M/M Lee C. Burton; M M Richard Campbell; M/M W. B. Eoff; M/M Cecil L. Hayes; M/M Don High; M/M Elston C. Johnson; M/M Richard Latimer; M/M Norman F. Loeffler; M/M Floyd L. McElreath; M/M Perda Miller; M/M Chester L. Moffitt; M/M R. M. Mullins; M/M Bill Parsons; M/M Lawrence R. Riley; M/M William T. Robbins, Jr.; M/M W. R. Rycoft; M/M Frederick Sanders; M/M William E. Saunders; M/M Chester O. Shackelford; M M Floyd L. Thompson; Dr/Mrs. L. A. Rentschler; Mrs. Mary Reyman; Mrs. Bonnie Bolding; Parents To Uphold Servicemen's Honor, Inc., a corporation,

Appellants/Intervenors.

APPEAL FROM DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

Hon. Elvin J. Brown, Trial Judge

Appellees commenced this action against appellants [public officials responsible for enforcing penal statutes] seeking judgment declaring 21 O.S. 1971 §§ 1218-1219 to be unconstitutional and enjoining appellants from enforcing the statutes against appellees. Intervenors sought judgment holding the statute to be constitutional and enjoining appellees from violating the statutes. Trial court entered judgment declaring statute to be unconstitutional, granting temporary

injunction enjoining appellant from enforcing the statutes against appellees, and denying injunctive relief to intervenors.

JUDGMENT REVERSED INSOFAR AS IT DECLARES THE STATUTES TO BE UNCONSTITUTIONAL AND GRANTS INJUNCTIVE RELIEF TO APPELLEES, AFFIRMED INSOFAR AS IT DENIES DECLARATORY AND INJUNCTIVE RELIEF TO INTERVENORS.

Stephen Jones,
Jones, Atkinson, Williams, Bane, & Klingenberg,
Enid, Oklahoma,
Oklahoma City, Oklahoma,
Washington, D. C.

Larry Derryberry,
Attorney General,
Mike D. Martin,
Assistant Attorney General,
Oklahoma City, Oklahoma.

Preston Trimble,
District Attorney,
Norman, Oklahoma. For Appellant.

Clyde Watts,
Watts, Looney, Nichols, J. Johnson,
Oklahoma City, Oklahoma. For Appellants Intervenors.

BERRY, J.:

Appellees [plaintiffs] brought this action challenging the constitutionality of 21 O.S. 1971 §§ 1218-1219, which make it unlawful for names of persons killed in military action to be displayed on cards or placards, or otherwise published for the purpose of anti-war, anti-draft, or anti-police demonstrations or protests, without the written consent of certain survivors of the deceased. Plaintiffs alleged they intended to violate the statute and sought a declara-

tory judgment the statute was unconstitutional and an injunction restraining the district attorney from prosecuting them for violations of the statute.

The district attorney of Cleveland County and the attorney general of the State of Oklahoma were joined as defendants, but the attorney general was dismissed from the action by the court. The district attorney filed an answer admitting he would prosecute plaintiffs if they violated the statute.

Parents and next of kin of servicemen killed in military action intervened and sought an injunction restraining plaintiffs from violating the statute.

A hearing was held and the trial court entered declaratory judgment declaring the statute unconstitutional and granted a temporary injunction enjoining defendant from enforcing the statute against plaintiffs. Defendant and intervenors appeal.

Section 1651 of the Declaratory Judgments Act [12 O.S. 1971 §§ 1651-1657] provides in part:

> "District * * * courts may, in cases of actual controversy, determine rights, status, or other legal relations, including * * * a determination of the construction or validity * * * of any statute * * *."

This Act was enacted in 1961 and the title of the Act provides it is "AN ACT relating to civil procedure * * *." 1961 S.L., p. 58.

Section 1654 provides any determination of rights under the Act "shall be reviewable in the same manner as other judgments."

At the time the statute was enacted, Art. VII § 2, Okla. Const., provided:

> "The appellate jurisdiction of the Supreme Court shall be co-extensive with the State, and shall extend

to all civil cases at law and in equity, and to all criminal cases until a Criminal Court of Appeals with exclusive jurisdiction in criminal cases shall be established by law."

Art. VII §4, Okla. Const., which was adopted in 1967, provides:

"The appellate jurisdiction of the Supreme Court shall be co-extensive with the State and shall extend to all cases at law and in equity; except that the Court of Criminal Appeals shall have exclusive appellate jurisdiction in criminal cases until otherwise provided by statute * * *."

20 O.S. 1971 § 40, which was enacted in 1910, provides:

"The Criminal Court of Appeals shall have exclusive appellate jurisdiction * * * in all criminal cases appealed from the district * * * courts, and such other courts of record as may be established by law."

The State of Texas also has separate appellate courts for civil and criminal matters.

In City of Amarillo v. Griggs, Tex.Civ.App., 406 SW2d 230, the plaintiffs operated an ambulance service licensed pursuant to state statutes, but did not secure a city permit required by applicable city ordinances which contained a penal provision. The ordinance was enforced against plaintiff and the city refused to do business with plaintiff due to plaintiff's non-compliance with the ordinance.

Plaintiffs sought a declaratory judgment holding the statute to be void and unconstitutional and also sought to enjoin its enforcement and discrimination by the city against plaintiffs for failure to secure a permit. The trial court entered a declaratory judgment holding the ordinance to be unconstitutional and enjoined the city from discriminating against plaintiffs for failure to comply, but refused

to enjoin penal enforcement of the ordinance. The city appealed.

The appellate court noted that equity will not enjoin enforcement of a criminal law unless it is unconstitutional or otherwise void, and enforcement thereunder involves an invasion of property rights which will result in irreparable injury. That court then stated:

> "The Uniform Declaratory Judgments Act * * * did not change the rules respecting jurisdiction of courts of equity to construe penal statutes or ordinances, courts having been given in such act power to enter declaratory judgments only within their respective jurisdictions.
>
> "In Stecher v. City of Houston, Tex.Civ.App., 272 S.W.2d 925 (N.R.E.) Stecher sought injunction against the City of Houston and prosecution agencies to enjoin enforcement of a penal traffic ordinance and a declaratory judgment, just as in our case. * * * The defendants excepted to the petition for lack of jurisdiction in the trial court on the ground that such relief could be granted only upon a showing of a vested property right, neither alleged nor shown. The trial court dismissed for want of jurisdiction and the intermediate appellate court affirmed. * * * In its opinion the appellate court quoted the trial court's Conclusion of Law No. 1 to the effect that the suit was essentially to restrain the police department and the City of Houston from enforcing a penal ordinance and that the character thereof was not changed by calling it a suit for declaratory judgment; that such judgment could not be enforced except by injunction; and Stecher not having any vested property rights in the use of the streets in the manner claimed by him, the court was without jurisdiction to entertain the cause of action. The appellate court then affirmed, saying:

"' * * * The Uniform Declaratory Judgments Act * * * was passed in 1943 by the 48th Legislature. At that time, it was well settled, as shown by the authorities heretofore cited, that jurisdiction to determine the validity of penal statutes and ordinances where irreparable injury to vested property rights is not involved, is vested exclusively in the criminal courts. * * * '

"We hold the trial court lacked jurisdiction. In the first place appellees had an adequate remedy at law by testing the constitutionality of the ordinance through the method of asserting such defense in criminal prosecution thereunder. * * *

" * * * However, the requirement of property rights being affected is related to this adequacy of remedy at law. * * * Wherein can it be said then that appellees have property rights to be protected? * * * "

Therefore, since proceedings under the declaratory judgment statute are civil proceedings, appeals from civil proceedings are to this Court, and at the time the statute was enacted, and at this time, we have a Court of Criminal Appeals with exclusive appellate jurisdiction over criminal cases, we conclude the reference in § 1651 to "construction or validity * * * of any statute * * * " was not intended to grant jurisdiction to district courts to grant declaratory judgments construing, or determining the validity of penal statutes in situations other than those wherein injunctive relief would have been appropriate prior to enactment of the statute.

As concerns when an injunction will be issued to enjoin enforcement of a penal statute or ordinance, in City of Blackwell v. Griffith Amusement Co., 160 Okl. 264, 16 P.2d 233, we held in paragraphs 1 and 2 of the syllabus:

"1. A prosecution * * * will not be enjoined on the mere ground the ordinance is void, because such in-

validity constitutes a complete defense to the prosecution, and is thus available in a court of law."

"2. Equity will restrain by injunction, criminal proceedings under an invalid ordinance which, if allowed to proceed, would destroy property rights and inflict irreparable injury."

In that case we reversed the trial court's judgment enjoining certain officials from enforcing an ordinance which prohibited plaintiffs from showing picture shows on Sunday on the ground the evidence was insufficient to show destruction of property or infliction of irreparable injury.

Certain cases do contain statements to the effect enforcement of an invalid ordinance will be enjoined to prevent injuries to a plaintiff as well as an injury to plaintiff's property. Nation v. Chism, 154 Okl. 50, 6 P.2d 766; Allen v. Oklahoma City, 175 Okl. 47, 52 P.2d 1054. However, both of those cases actually involved property rights. In Nation v. Chism, supra, the plaintiff sought to enjoin enforcement of an act regulating barbers. In paragraph 5 of the syllabus we held:

"The right to labor or earn ones livelihood in any legitimate field of industry or business is a right of property * * *."

In Allen v. Oklahoma City, supra, the plaintiff sought to enjoin enforcement of a city ordinance which made it unlawful for a person of her race to reside in a house owned by her. In paragraph 1 of the syllabus we held:

"Equity will restrain by injunction a proceeding under an invalid ordinance which, if allowed to proceed, would destroy property rights and inflict irreparable injury."

In the present case no allegation was made, or evidence offered, indicating that property rights would be destroyed if enforcement of the statute was not enjoined.

Therefore, we conclude that the trial court erred in granting the temporary injunction and erred in granting declaratory relief to plaintiffs.

Intervenors contend the trial court should have entered declaratory judgment declaring the statute to be constitutional and an order restraining plaintiffs from violating the statute.

As a general rule an injunction will not issue to restrain commission of a threatened act merely to prevent the violation of a penal statute, Schmoldt v. Oakley, Okl., 390 P.2d 882, unless a statute provides a remedy by injunction to restrain violations, 42 Am.Jur.2d, Injunctions § 157. However, where an injunction is otherwise warranted, the court may enjoin certain acts affecting rights, property and general welfare of people even though such acts are also criminal offenses. State Bar of Oklahoma v. Retail Credit Assn., 170 Okl. 246, 37 P.2d 954; Curtis v. Registered Dentists of Oklahoma, 193 Okl. 233, 143 P.2d 427; Taylor v. State ex rel. Rutherford, 291 P.2d 1033, appeal dismissed, 77 S.Ct. 33, 352 U.S. 805, 16 L.Ed.2d 38; Semke v. State ex rel. Okla. Motor Vehicle Comm., Okl., 465 P.2d 441.

In Simons v. Fahnestock, 187 Okl. 460, 78 P.2d 388, we held in paragraph 3 of the syllabus:

> "It is not sufficient ground for injunction that the injurious acts may possibly be committed or that injury may possibly result from the acts sought to be prevented; but there must be at least a reasonable possibility that the injury will be done if no injunction is granted * * *."

Here the evidence introduced indicated plaintiffs had not violated the statute in Cleveland County prior to the hearing and the evidence did not establish plaintiffs would violate the statute in the future if it were not held to be unconstitutional. Furthermore, the district attorney indicated he would enforce the statute.

We conclude intervenors were not entitled to injunctive relief and therefore were not entitled to declaratory relief.

The judgment of the trial court is reversed insofar as it granted declaratory and injunctive relief to plaintiffs, and affirmed to the extent it denied injunctive and declaratory relief to intervenors.

WILLIAMS, V.C.J. and LAVENDER, BARNES, SIMMS, JJ., concur.

IRWIN and DOOLIN, JJ., concur in result.

DAVISON, C.J. and HODGES, J, dissent.

APPENDIX V

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

March 26, 1974

The Petition for Rehearing in the following cases is denied . . . 45, 198, Mike Anderson, et al v. Preston Trimble, et al.

Attest:

Ross Lillard
Clerk

CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing Petition were mailed by United States mail, postage prepaid, to Mr. Larry Derryberry, Attorney General, State Capitol, Oklahoma City, Oklahoma 73105; Mr. Preston Trimble, District Attorney, Cleveland County Courthouse, Norman, Oklahoma 73609; and, to Mr. Clyde Watts, 219 Couch Drive, Oklahoma City, Oklahoma 73102, on this ..... day of July, 1974.

.....

Stephen Jones

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. A-1284

Mark Anderson, et al.,
Petitioners,

versus

Preston Tarrant, et al.,
Respondents.

BRIEF OPPOSING CERTIORARI

Larry Derryberry
Attorney General of Oklahoma
Mark D. Morris
Assistant Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105
Counsel for Respondents

September, 1974

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TABLE OF CONTENTS

	PAGE
Questions Presented	1
Reasons for Not Granting the Writ	2
I. Declaratory and injunctive relief were properly denied by the Oklahoma Supreme Court	2
II. The right to privacy is a substantial governmental interest	3
Conclusion	4

TABLE OF AUTHORITIES

CASES:

Cox v. State of Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471	3
Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22	2, 3
Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734	4
Young, Ex Parte, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714	2

STATUTES:

21 O.S. 1971, §1218	2, 3

In the
Supreme Court of the United States
OCTOBER TERM, 1974

No. A-1254

MIKE ANDERSON, ET AL.,
Petitioners,

VERSUS

PRESTON TRIMBLE, ET AL.,
Respondents.

BRIEF OPPOSING CERTIORARI

QUESTIONS PRESENTED

1. Is a statute forbidding the use of the names of war dead without the prior consent of surviving family in connection with any anti-war, anti-police action or anti-draft demonstration in a public place unconstitutional under the First and Fourteenth Amendments of the Constitution?

2. Do state courts have jurisdiction to grant declaratory and/or injunctive relief construing or determining the validity of penal statutes where there would be no destruction of property rights and infliction of irreparable injury?

REASONS FOR NOT GRANTING THE WRIT ARGUMENT AND AUTHORITIES

I

DECLARATORY AND INJUNCTIVE RELIEF WERE PROPERLY DENIED BY THE OKLAHOMA SUPREME COURT.

Petitioners contend that their constitutional rights have been violated in being denied declaratory and injunctive relief; that severe and irreparable harm will result if they are prosecuted for violating the provisions of 21 O.S. 1971, §1218. They also allege that "significant questions" as to the awarding of declaratory and injunctive relief are raised by this case.

In making these allegations, petitioners avoid the question of why they were denied relief by the Oklahoma Supreme Court. Equity will not enjoin enforcement of a criminal law unless it is unconstitutional or otherwise void, and enforcement thereunder involves an invasion of property rights which will result in irreparable injury. While petitioners allege they will suffer severe and irreparable harm from prosecution, no allegation has been made, or evidence offered, indicating that property rights would be destroyed if enforcement of the statute was not enjoined. There being no evidence or facts to support their legal position, petitioners have failed to present a question for consideration.

Petitioners cite *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, and *Dombrowski* v. *Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22, for the proposition that they are entitled to declaratory and injunctive relief. *Ex parte Young, supra*, actually involved property rights, the plaintiff, a stockholder in a railroad company, seeking to enjoin

the enforcement of a statute providing for the establishment of rates for railroad transportation. In *Dombrowski* v. *Pfister, supra,* a federal injunction against a threatened state criminal prosecution was allowed due to the vagueness and overbreadth of the statute. Irreparable injury was shown by substantial loss or impairment of freedom of expression in awaiting state court's disposition and appropriate review and by a situation in which defense of the prosecution would not assure adequate vindication of constitutional rights. There is no loss or impairment of freedom of expression in this case because 21 O.S. 1971, §1218, regulates a course of conduct not even constituting symbolic speech. See *Cox* v. *State of Louisiana,* 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471. Nor is there any allegation of vagueness or overbreadth or that a situation exists in which defense of the prosecution would not assure vindication of constitutional rights.

II

THE RIGHT TO PRIVACY IS A SUBSTANTIAL GOVERNMENTAL INTEREST.

The State of Oklahoma has a substantial governmental interest in protecting the right to privacy of the names of war dead by regulating a course of conduct not constituting speech. See *Cox* v. *State of Louisiana,* 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471. In enacting 21 O.S. 1971, §1218, the Oklahoma Legislature sought to correct a very specific evil, the use of a deceased's name in a manner that invaded the right to privacy of the survivors. To correct such evil, legislation was enacted to strike at the abuse, the use of war dead names in anti-war, anti-draft and anti-police demon-

strations and protests. Long ago the Court upheld the sanctity of the individual's right to control his own person. In *Union Pacific Railway Co.* v. *Botsford*, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734, the Court observed:

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'the right to one's person may be said to be a right to complete immunity: to be let alone.'"

CONCLUSION

THEREFORE, premises considered, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LARRY DERRYBERRY
Attorney General of Oklahoma

MIKE D. MARTIN
Assistant Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105

Counsel for Respondent

September, 1974

CERTIFICATE OF SERVICE

This is to certify that I mailed three copies of the above and foregoing instrument to which this certification is attached, to the following named counsel of record this ..... day of September, 1974:

Stephen Jones
525 Fidelity Plaza
Oklahoma City, Oklahoma 73102
Attorney for Petitioner

Clyde Watts
219 Couch Drive
Oklahoma City, Oklahoma 73102
Attorney for Respondents/Intervenors

.....
MIKE D. MARTIN

SUPREME COURT, U. S

FILED

OCT 15 1974

MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-3

MIKE ANDERSON, ET AL.,
Petitioners,

VERSUS

PRESTON TRIMBLE, ET AL.,
Respondents.

PETITIONERS' BRIEF ON THE ISSUE OF MOOTNESS

STEPHEN JONES
525 Fidelity Plaza
Oklahoma City, Oklahoma 73102
(405) 239-6707

Counsel for Petitioners

October, 1974

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Statement	1
Argument	2
Proposition I: Since Title 21 O.S. 1973, §1218 and §1219 remain the law of the State, and the Respondent has indicated he will enforce its provisions, the issues here are real and continuing and not moot	2
Proposition II: The passage of time after the dates of the demonstration has not mooted the issues	3
Proposition III: This case has none of the traditional benchmarks that this Court has used in determining the issue of mootness	4
Conclusion	7

TABLE OF AUTHORITIES

CASES:

Berry v. Davis, 242 U.S. 468, 37 S.Ct. 208, 61 L.Ed. 441	2
Boise City Irr. and Land Company v. Clark, 131 Fed. 415 (9th Cir. 1904)	4
Friend v. United States, 128 U.S. App. D.C. 323, 388 F.2d 579 (C.A. D.C. 1907)	4
Gay Union Corp. v. Wallen, 71 App. D.C. 382, 112 F.2d 192, cert. den. 310 U.S. 647, 60 S.Ct. 1098, 84 L.Ed. 1414 (1940)	4
Southern Pacific Terminal Company v. ICC, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911)	4

AUTHORITIES CONTINUED PAGE

Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 73 A.L.R. 1484, 75 L.Ed. 117 (1931) 6

Super Tire Engineering Company v. McCorkle, 469 F.2d 911 (C.A. N.J. 1972) 5

Walter Holm Company v. Harden, 449 F.2d 1009 4

Women's Strike for Peace v. Hickle, 420 F.2d 597, 137 U.S. App. D.C. 29, Appeal after Remand, 472 F.2d 1273 3

STATUTES:

50 U.S.C.A. App. §460(h) 6

21 O.S. 1973, §1218 1, 2, 5

21 O.S. 1973, §1219 2, 5

MISCELLANEOUS:

Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, by Richard F. Wolfson and Phillip B. Kurland, Sec. 270 through 285 4

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-3

MIKE ANDERSON, ET AL.,
Petitioners,

VERSUS

PRESTON TRIMBLE, ET AL.,
Respondents.

PETITIONERS' BRIEF ON THE ISSUE OF MOOTNESS

Counsel has been requested by the Court to file a brief on the possibility of mootness of the issue involved in this case.

The Oklahoma Supreme Court had ruled, in reversing the District Court of Cleveland County, that the Petitioners were not entitled to declaratory and injunctive relief against a statute which makes it a state crime for the Petitioners or anyone else to display the names of war dead on placards during "anti-war, anti-police action, or anti-draft demonstrations." 21 O.S. 1973, §1218.

Although the Court order did not set forth the reasons why the Court was concerned about the possibility of mootness, it is apparent that there might be two reasons for this concern: First, the date, Labor Day 1971, the Petitioners

were going to use the names of Viet Nam war dead to protest the war and draft has passed; second, the United States has withdrawn from active participation in the military conflict in Viet Nam, therefore, there is no reason to protest such participation. Neither one of these considerations, Petitioners believe, is sufficient to justify dismissal of the matter on the ground of mootness.

PROPOSITION I

SINCE TITLE 21 O.S. 1973 §1218 AND §1219 REMAIN THE LAW OF THE STATE, AND THE RESPONDENT HAS INDICATED HE WILL ENFORCE ITS PROVISIONS, THE ISSUES HERE ARE REAL AND CONTINUING AND NOT MOOT.

At the threshold, we observe that Title 21 O.S. 1973, §§1218 and 1219, which makes it a crime to carry on placards or otherwise publish for the purpose of any anti-war, anti-police action or anti-draft demonstration or protest on the grounds of schools, colleges, and universities, the names of persons killed in military action without the consent of the surviving spouse, remains in full force and effect today. Petitioners, then, remain subject to prosecution should they exercise their First Amendment rights. This is not a case where the statute whose enforcement is sought to be enjoined has been repealed or declared unconstitutional by the State's highest court as was the case with *Berry* v. *Davis*, 242 U.S. 468, 37 S.Ct. 208, 61 L.Ed. 441.

Two, the decision of the Oklahoma Supreme Court indicates that it did not feel the issue in the case was moot. The decision of Oklahoma's highest court on the merits was rendered on January 8, 1974 (Petition, Appendix, page xi), two and one-half years after the proposed

Labor Day demonstration, and almost one year after the signing of the Paris Accords in which United States military involvement in the war in Southeast Asia was reduced. The petition for rehearing in the Supreme Court of Oklahoma was denied on March 6, 1974 (Petition, Appendix, page xix). There is nothing in either the opinion of the Court or the order denying the petition for rehearing which indicates that the Court was in any way influenced or even considered the question of mootness.

Three, the central fact situation in the case and the legal question involved still remains unanswered by this Court. For this case poses that narrow, but essential fact situation whether a person is entitled under the Constitution to declaratory and injunctive relief against penal enforcement of a criminal statute which on its face is patently and flagrantly unconstitutional in that it proscribes protected First Amendment rights. This case involves a situation where the threat of prosecution is real, not imagined.

PROPOSITION II

THE PASSAGE OF TIME AFTER THE DATES OF THE DEMONSTRATION HAS NOT MOOTED THE ISSUES.

Petitioners initially sought to carry on their peaceful demonstration on Labor Day 1971, on the campus of the University of Oklahoma at Norman. The fact that that day has passed does not moot the issues in this case. *Women's Strike for Peace* v. *Hickle*, 420 F.2d 597, 137 U.S. App. D.C. 29, Appeal after Remand, 472 F.2d 1273. In that case the United States Court of Appeals for the District of Columbia Circuit held that the fact the case was still in litigation after the date on which the Plaintiff organization intended to

hold a public demonstration did not moot their lawsuit when there was a likelihood that a demonstration could be rescheduled. Courts have previously noted that where the controversy involves essentially recurring issues of public interest, it is not mooted merely because the most recent particular occasion for consideration of the issue has come and gone. *Walter Holm Company* v. *Harden*, 449 F.2d 1009; *Friend* v. *United States*, 128 U.S. App. D.C. 323 at 325, 388 F.2d 579 at 581 (C.A. D.C. 1907); *Southern Pacific Terminal Company* v. *ICC*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911); *Gay Union Corp.* v. *Wallen*, 71 App. D.C. 382, 112 F.2d 192, *cert. den.* 310 U.S. 647, 60 S.Ct. 1098, 84 L.Ed. 1414 (1940); *Boise City Irr. and Land Company* v. *Clark*, 131 Fed. 415 at 419 (Ninth Circuit 1904).

PROPOSITION III

THIS CASE HAS NONE OF THE TRADITIONAL BENCHMARKS THAT THIS COURT HAS USED IN DETERMINING THE ISSUE OF MOOTNESS.

As is well known, this Court will hear only actual cases or controversies. Traditionally, various standards have been developed to resolve the issue of mootness if it arises in a case this Court is considering. *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, by Richard F. Wolfson and Phillip B. Kurland, Sec. 270 through 285. Four concerns that this Court has addressed itself to in resolving the question of mootness are: that some sort of judicial decree be possible, that the parties remain in a posture sufficiently adverse to insure effective litigation, that the issue in contention continue to be concrete, and that the issue not be one that will recur and yet

be unreviewable. *Super Tire Engineering Company* v. *McCorkle*, 469 F.2d 911 (C.A. N.J. 1972).

a. *Some Sort of Judicial Decree Be Possible.* The entry of judgment or a decree in this case is clearly possible. There has been no compromise or settlement; there has been no release of the right to review; there has been no surrender of the subject matter in the suit or conveyance thereof to third persons; there has been no disillusionment of a corporate party; there has been no amendment or repeal of the statute, and there has been no death of a named party.

b. *That the Parties Remain in a Posture Sufficiently Adverse to Insure Effective Litigation.* A reading of the transcript of evidence in the trial court will show that the parties are more than sufficiently adverse and antagonistic to each other legally to insure that this is a genuine case or controversy. Indeed, part of the answer filed by the respondents was stricken because of the personal allegations made against the Plaintiffs. The contest below was spirited, heated, and well argued. The respondent in his answer clearly admitted that he would enforce the law and that he would file a criminal prosecution against the Plaintiffs in the event their activities violated 21 O.S. 1973, §§1218 and 1219. This determination was reasserted at the hearing on the merits. The threat of prosecution for First Amendment activities is genuine. This same respondent on June 4, 1970, filed a criminal case, CRF 70-201 against Keith B. Green alleging violation of the felony statute which makes it a crime to carry a "red flag" in Oklahoma. Keith Green had been arrested following display of a Viet Cong flag at an ROTC

demonstration on the University of Oklahoma campus. Notwithstanding the fact that this Court had declared similar statutes unconstitutional nearly forty years before, *Stromberg* v. *California*, 283 U.S. 359, 51 S.Ct. 532, 73 A.L.R. 1484, 75 L.Ed. 117 (1931), prosecution was commenced, the defendant Green bound over, and the case was dismissed on September 4, 1970, on defendant's motion to quash, by the District Judge. Thus, the possibility of prosecution of the Plaintiffs by respondent for exercising their First Amendment rights is genuine.

c. *That the Issue in Contention Continue to Be Concrete.* The issue in this case certainly continues to remain concrete and of public concern and it is recurring in nature. That issue is whether a defendant, a party in Oklahoma, may be prosecuted under a patently, unconstitutional penal statute for exercising his First Amendment rights. Also involved is the question of whether the party may seek declaratory and injunctive relief in State Court to enjoin prosecution of such an obviously, flagrantly unconstitutional statute. The issue is likely to arise again in several contexts. First, the Plaintiffs could protest increased involvement by the United States in the Viet Nam conflict or for that matter in any other conflict. Two, the Plaintiffs or others might seek to protest certain police action by carrying on placards the names of war dead. Third, should the draft be reinstated (50 App. U.S.C. 460(h)), the protesting of such reinstatement by carrying the names of those who have been conscripted into military service and then killed in the line of duty would be an entirely appropriate demonstration. The possibility of future litigation is great, not minimal.

d. *That the Issue Be One That Will Recur and Yet Be Unreviewable.* Under the circumstances set forth above, it is clear that this is not a situation where the issue will recur and not be reviewable.

Therefore, using the traditional benchmarks of this Court, it is clear that the issue here is not moot and the Petition should be granted and the decision of the Oklahoma Supreme Court reversed.

Respectfully submitted,

STEPHEN JONES
525 Fidelity Plaza
Oklahoma City, Oklahoma 73102
(405) 239-6707

Counsel for Petitioners

October, 1974

CERTIFICATE OF MAILING

This is to certify that three copies of the above and foregoing Petition were mailed by United States mail, postage prepaid, to Mr. Larry Derryberry, Attorney General, State Capitol, Oklahoma City, Oklahoma 73105; Mr. Preston Trimble, District Attorney, Cleveland County Courthouse, Norman, Oklahoma 73609; and, to Mr. Clyde Watts, 219 Couch Drive, Oklahoma City, Oklahoma 73102, on the ..... day of October, 1974.

.....

Stephen Jones

SUPREME COURT, U. S.

FILE
OCT 17
MICHAEL RODAK, JR.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-3

MIKE ANDERSON, ET AL.,
Petitioners,

VERSUS

PRESTON TRIMBLE, ET AL.,
Respondents.

SUPPLEMENTAL RESPONSE RE MOOTNESS

LARRY DERRYBERRY
Attorney General of Oklahoma
MIKE D. MARTIN
Assistant Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105

Counsel for Respondents

October, 1974

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

PAGE

Question Presented:

1. Does a justiciable controversy exist to allow review by the Court? 1

Conclusion 10

TABLE OF AUTHORITIES

CASES:

Barr v. Matteo, 355 U.S. 171, 78 S.Ct. 204, 2 L.Ed.2d 179 (1958) 7, 8

Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) 9

Carroll v. Princess Anne, 393 U.S 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968) 8

Eccles v. Peoples Bank of Lakewood Village, Cal., 333 U.S. 426, 68 S.Ct. 641, 92 L.Ed. 784, reh. den. 333 U.S. 877, 68 S.Ct. 900, 92 L.Ed. 1153 (1948) 1

Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1909) 7

Hudspeth v. Com., 204 Ky. 606, 265 S.W. 18 (1924) 5

Mills v. Green, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293 (1895) 6

Moore v. Ogilvie, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969) 8

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) 7, 8

Rowland v. Tarr, 480 F.2d 545 (1973) 4

AUTHORITIES CONTINUED

PAGE

Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911) 8
State v. Pray, 30 Nev. 206, 94 Pac. 218 (1908) 5
State v. Pyle, 62 Okla.Cr. 411, 71 P.2d 997 (1937) 5

STATUTES:

50 U.S.C.A. App. §467(c) of the Military Selective Service Act 5
21 O.S. 1971, §§1218 and 1219 2

In the
Supreme Court of the United States
OCTOBER TERM, 1974

No. 74-3

MIKE ANDERSON, ET AL.,
Petitioners,

VERSUS

PRESTON TRIMBLE, ET AL.,
Respondents.

SUPPLEMENTAL RESPONSE RE MOOTNESS

QUESTION PRESENTED

1. DOES A JUSTICIABLE CONTROVERSY EXIST TO ALLOW REVIEW BY THE COURT?

Petitioners contend their constitutional rights were violated in being denied declaratory and injunctive relief by the Oklahoma Supreme Court. In asking the Court to accept certiorari they allege that "significant questions" as to the awarding of declaratory and injunctive relief are raised by this case. As stated by the Court in *Eccles* v. *Peoples Bank of Lakewood Village*, Cal., 333 U.S. 426, 68 S.Ct. 641, 92 L.Ed. 784, *reh. den.* 333 U.S. 877, 68 S.Ct. 900, 92 L.Ed. 1153 (1948):

> "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of

judicial discretion, exercised in the public interest. *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 86 L.Ed. 1620, 62 S.Ct. 1173, 18 NCCA NS 687; *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 297, 298, 87 L.Ed. 1407, 1410, 1411, 63 S.Ct. 1070; HR Rep No 1264, 73d Cong 2d Sess p 2; Borchard, Declaratory Judgments 2d ed (1941) pp 312-314. It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.

"The actuality of the plaintiff's need for a declaration of his rights is therefore of decisive importance. . . ."

The need for equitable relief in this case is found in petitioners' "Amended Petition" filed in August of 1971 in the District Court, Cleveland County, State of Oklahoma, wherein they asked for a declaratory judgment declaring 21 O.S. 1971, §§1218 and 1219 to be unconstitutional and for temporary and permanent injunction enjoining respondents from prosecuting them under said provisions. Their cause of action was based in part on the following assertions made in their "Amended Petition":

"1. That each of the above named plaintiffs is active in legal protests and demonstrations against the policy pursued by the Government of the United States in South East Asia.

"2. That as a part of their protest activities these individuals have in the past lead and participated in various demonstrations *protesting the War in Viet Nam.* That they have furthermore joined together in membership in various organizations two of which are the

Viet Nam Veterans Against the War and the War Resisters League of Oklahoma. That the mailing address and actual place of business for both of these organizations is 1355½ Jenkins, Norman, Cleveland County, Oklahoma.

". . .

"6. That on Labor Day, 1971, each of these plaintiffs and several other individuals, possibly as many as a Hundred (100), will participate in an anti-War demonstration in Cleveland County, State of Oklahoma. That the purpose of said demonstration will be a peaceful assembly to *protest United States activities in Viet Nam* and South East Asia. That as a part of their protest these plaintiffs and other people participating in the demonstration shall carry and display on cards and/or placards and otherwise cause to be published for the purpose of *protesting against the War and against the Draft* on the grounds of the University of Oklahoma at Norman, and the Cleveland County Court House, the names of all or some of the United States soldiers among others, who have been killed as a result of the United States involvement in the Viet Nam War. That the plaintiffs do not intend to seek the written consent of the surviving spouse of such deceased person if he was married at the time of his death or if he was unmarried the written consent of one or both of the parents or for that matter to secure the written consent of any next of kin of anyone killed in the War that was a United States soldier at the time of his death.

"7. That after Labor Day, 1971, if this Court has acted on the plaintiffs prayer for relief, the plaintiffs intend to continue their peaceful demonstrations in Cleveland County, in the State of Oklahoma, on public property to protest the War in Viet Nam and will continue to carry and display on cards and or placards

and otherwise cause to be published for the purpose of *protesting against the War and against the Draft*, the names of all or some of the United States soldiers among others, who have been killed as a result of the United States involvement in Viet Nam War. That the plaintiffs on these subsequent occasions do not intend to seek the written consent of the surviving spouse of such deceased person if he was married at the time of his death, or if he was unmarried the written consent of one or both of the parents or for that matter to secure the written consent of any next of kin of anyone killed in the War that was a United States soldier at the time of his death." (Emphasis added.)

Petitioners' need for a declaration of their rights is based upon their desire to protest the United States' participation in the Vietnam War and against the "draft." Respondents contend that the bases for petitioners' need no longer exist and that no justiciable controversy exists requiring certiorari review. The fact that the United States is no longer participating in the Vietnam War was recognized by the United States Court of Appeals, Third Circuit, in *Rowland* v. *Tarr*, 480 F.2d 545 (1973), wherein the Court stated:

"Count V is non-justiciable because of mootness. Appellants claimed that the Vietnam conflict was an illegal and unconstitutional war contrary to the principles of military, national, and international law. We take judicial notice that as of this date no one subject to the Military Selective Service Act will be called to serve in Vietnam and that American participation in that conflict has been terminated."

Respondents ask this Court to also take judicial notice that United States' participation in the Vietnam War has been terminated.

Title 50 U.S.C.A. App. §467(c) of the Military Selective Service Act provides:

> "Notwithstanding any other provision of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], no person shall be inducted for training and service in the Armed Forces after July 1, 1973, except persons now or hereafter deferred under section 6 of this title [section 456 of this Appendix] after the basis for such deferment ceases to exist."

The effect of this provision is to replace the "draft" with a system of providing manpower for the Armed Forces of the United States on a voluntary basis. Respondents ask this Court to also take judicial notice that the "draft" has ended.

A moot case is one which seeks to obtain a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right, before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then existing controversy. As falling within that category, it is well established that where, pending an appeal, an event occurs which makes a determination of the question unnecessary, or which would render the judgment that might be pronounced ineffectual, the appeal should be dismissed. *Hudspeth* v. *Com.*, 204 Ky. 606, 265 S.W. 18 (1924); *State* v. *Pyle*, 62 Okla. Cr. 411, 71 P.2d 997 (1937). To the same effect is

State v. *Pray*, 30 Nev. 206, 94 Pac. 218 (1908); *Mills* v. *Green*, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293 (1895).

In *Mills* v. *Green*, *supra*, a bill in equity was brought to secure a right to vote at an election to be held in August, 1895, of delegates to the constitutional convention of South Carolina. Before appeal was taken by the plaintiff from the decree of the Circuit Court of Appeals dismissing the bill, that date had passed; and, before the entry of the appeal in this Court, the convention had assembled, pursuant to the statutes of South Carolina of 1894, by which the convention had been called. In dismissing the appeal the Court said:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord* v. *Veazie*, 8 How. 251; *California* v. *San Pablo & Tulare Railroad*, 149 U.S. 308."

Since the United States is no longer involved in the Vietnam War and the "draft" no longer exists, petitioners' cause of action has become moot and no justiciable controversy is presented for the Court to review. As stated by the

Court in *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973):

> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 95 L.Ed. 36, 71 S.Ct. 104 (1950); *Golden* v. *Zwickler*, supra; *SEC* v. *Medical Committee for Human Rights*, 404 U.S. 403, 30 L.Ed.2d 560, 92 S.Ct. 577 (1972)."

A petition for a declaratory judgment is no exception to the rule that mootness is to be judged at the present moment, not as of the date of the filing of the complaint. *Golden* v. *Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1909).

While petitioners may urge the Court to accept certiorari to determine the constitutionality of the statutes in question and thus foreclose its application to others in other situations or to petitioners themselves in future protests, consitutional judgments on public laws are justified only when compelled by the adjudication of rights in litigation before the Court. Such an argument was answered by the Court in *Barr* v. *Matteo*, 355 U.S. 171, 78 S.Ct. 204, 2 L.Ed.2d 179 (1958), wherein the Court said:

> "The scope of the litigation in the Court of Appeals cannot lessen this Court's duty to confine itself to the proper exercise of its jurisdiction and the appropriate scope of judicial review. Thus, an advisory opinion cannot be extracted from a federal court by agreement of the parties, see *Swift & Co.* v. *Hocking Valley R. Co.*, 243 US 281, 289, 61 L ed 722, 725, 37 S Ct 287, and no matter how much they may favor the settle-

> ment of an important question of constitutional law, broad considerations of the appropriate exercise of judicial power prevent such determinations unless actually compelled by the litigation before the Court. *United States* v. *CIO*, 335 US 106, 110, 92 L ed 1849, 1855, 18 S Ct 1349. Likewise, 'Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing. Many of the same reasons are present which impel them to abstain from adjudicating constitutional claims against a statute before it effectively and presently impinges on such claims.' *Eccles* v. *Peoples Bank*, 333 US 426, 432, 92 L ed 784, 789, 68 S Ct 641."

Nor does this case present a justification for a conclusion of non-mootness on the basis that it is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911); *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); *Carroll* v. *Princess Anne*, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968). Such a justification would have application in a case like *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), where appellant's suit to declare the Texas criminal abortion statutes unconstitutional was not declared moot on appeal. Even though appellant's pregnant state at the filing of the lawsuit no longer existed on appeal the Court answered the mootness argument in stating:

> "Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a class of justification for a conclusion of non-mootness. It truly could be 'capable of repetition, yet evading review.'"

In *Broadrick* v. *Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), the Court stated it thusly:

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. See, e.g. *Austin* v. *The Alderman*, 7 Wall. 694, 698-699 (1868); *Supervisors* v. *Stanley*, 105 U.S. 305, 311-315 (1881); *Hatch* v. *Reardon*, 204 U.S. 152, 160-161 (1907); *Yazoo & Miss. Valley R.* v. *Jackson Vinegar Co.*, 226 U.S. 217, 219-220 (1912); *United States* v. *Wurzbach*, 280 U.S. 396, 399 (1930); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 513 (1937); *United States* v. *Raines*, 362 U.S. 17 (1960). A closely related principle is that constitutional rights are personal and may not be asserted vicariously. See *McGowan* v. *Maryland*, 366 U.S. 420, 429-430 (1961). These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. See *Younger* v. *Harris*, 401 U.S. 37, 52 (1971). Constitutional judgments, as Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court:
>
> > 'So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.' *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)."

CONCLUSION

THEREFORE, premises considered, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LARRY DERRYBERRY
Attorney General of Oklahoma
MIKE D. MARTIN
Assistant Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105

Counsel for Respondents

October, 1974

CERTIFICATE OF MAILING

This is to certify that I mailed three copies of the above and foregoing instrument to which this certification is attached, to the following named counsel of record, this ..... day of October, 1974:

Stephen Jones
525 Fidelity Plaza
Oklahoma City, Oklahoma 73102
Attorney for Petitioner

Clyde Watts
219 Couch Drive
Oklahoma City, Oklahoma 73102
Attorney for Respondents/Intervenors

.....
Mike D. Martin